Supreme Court, U.S.
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No. 99-1945

IN THE

Supreme Court of the United States

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Petitioners,

v.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY and VALLEY FORGE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY APPELLATE DIVISION

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the trial court to apply a limited retroactivity to its interpretation of N.J.S.A. 34:15-40 violated the equal protection and due process rights of class members and the Supremacy Clause of the United States Constitution.

PARTIES TO PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The brief of Petitioners accurately lists the parties to this proceeding. CNA Insurance Companies is not a legal entity; it is a service mark for several insurance companies. Respondent, Continental Casualty Co., is the parent company of all the other Respondents. No publicly held company owns 10% or more of the stock of these companies and Continental Casualty Co. is a wholly owned subsidiary of CNA Financial Corp.

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28 U.S.C.A. § 1254(1) 2

28 U.S.C.A. § 1257(a) 2

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Respondent, CNA Insurance Companies ("CNA"), respectfully requests that the Petition for a Writ of Certiorari filed by Petitioners, Diane Kuhnel, individually and on behalf of all other workers' compensation lien payers, be denied.

OPINIONS BELOW

Petitioners filed a class action in the Chancery Division of the Superior Court of New Jersey, *Kuhnel v. CNA Insurance Companies*, Docket Number ATL-C-184-94, N.J. Super. (Ch. 1994), claiming that she and others were deprived of their full workers' compensation recovery by the CNA Insurance Companies ("CNA") since the lien against a third party recovery included the insurer's portion of her attorney's fee and experts' fees.

The New Jersey Workers' Compensation Act, at N.J.S.A. 34:15-40, provides that an insurer's lien against a third party recovery shall include medical benefits and compensation paid to the worker. CNA claimed that "compensation" included all fees payable to the employee's attorney and experts. The trial court ruled that the term "compensation" did not include the employer's/insurer's portion of the attorney's fee and the experts' fees and applied that ruling retroactively to Ms. Kuhnel and other class members who had open claims, but refused to reopen closed claims. Reopening closed claims would create chaos in the judicial system and the trial court found that there was no reason to disturb closed cases. The Appellate Division agreed. The New Jersey Supreme Court denied Petitioners' Petition for Certification.

COUNTERSTATEMENT OF JURISDICTION

Respondent objects to Petitioners' claim that jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1). This Court lacks jurisdiction under 28 U.S.C.A. § 1254(1) as this not a case from a court of appeals. The jurisdiction of this Court, if any, is properly invoked under 28 U.S.C.A. § 1257(a).

STATEMENT OF FACTS

Respondent relies upon the facts as stated in the Appellate Division's opinion at *Kuhnel v. CNA Insurance Companies*, 322 N.J. Super. 568 (1999).

COUNTERSTATEMENT OF BACKGROUND

In their Petition for Certiorari, p. 3, Petitioners indicate that, prior to the Chancery Division's decision, the class was certified. That statement is misleading. While a class was certified, it was not perfected because the members of the class were not notified. The class was initially described as all employees who received workers' compensation payments against which a lien was asserted by the employer or its insurance company. In fact, the class had two types of claimants, although not specifically delineated as such: those with open claims and those whose claims had been closed by settlement, judgment or otherwise.

Petitioners also incorrectly state Judge Gibson's holding and its application as:

> The Court also held that the return of the wrongfully included lien amounts would be

> limited to only the named plaintiff individually, and denied recovery to the class members who were similarly situated. The ruling applied prospectively only, except for plaintiff, despite the status of the class numbers as parties to the action.

Petition for Writ of Cert., p.3.

The pertinent part of Judge Gibson's holding is as follows:

> So it is my conclusion that the rulings that I've made should apply retroactively to this extent only, they should apply to the *current plaintiffs* because I believe that the current plaintiffs deserve the benefits of this ruling given the investment that they made. And I believe that this ruling *should also apply to any other plaintiffs similarly situated who have not yet gone to judgment or reached an agreement incorporated by a writing or release*. Stated differently, to the extent that there are pending cases out there for which the lienability of these items is still an open question, this ruling would apply and bind CNA and would bind Aetna. Beyond that, the ruling would simply apply prospectively.

Appendix C to Petition for Writ of Cert., p. 28C (emphasis added).

Moreover, Petitioners incorrectly indicated that "no pre-decision briefing or argument relating to the retroactivity issue occurred at the trial court level . . ." Petition for Writ

of Cert., p.3. Respondent did brief the retroactivity application issue at the trial court level. (Appendix A, attached hereto).

The issue advanced by Petitioners was not raised below. Petitioners admit that they "never specifically raised the Fourteenth Amendment in its brief or argument", saying that they raised it by inference ("repeatedly argued the obvious inequities"), yet they identify it as a controlling question in their Petition for a Writ of Certiorari. Petition for Writ of Cert., p. 3. Petitioners only presented one question to the New Jersey Supreme Court in their petition for certification:

> In a class action where the class has been certified, may a Court, when rendering a declaratory judgment interpreting a statute, restrict the application of its declaration of what the law is to apply only to the named plaintiff and thereafter prospectively only, while entering a judgment applying the incorrect law to the other parties who are similarly situated members of the certified class? App. 4A to Petition.

SUMMARY OF ARGUMENT

The decisions of the Chancery and Appellate Divisions of New Jersey do not conflict with this Court's decisions on the retroactive application of a law. The New Jersey Courts applied state law consistently with this Court's retroactivity doctrine. Consequently, the class members were not denied equal protection or due process by the New Jersey courts' decisions nor was the Supremacy Clause violated.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court's decisions in *James B. Beam Distilling Company v. Georgia, et al.*, 501 U.S. 529 (1991) and *Harper v. Virginia*, 509 U.S. 86 (1993) vitiated the analysis of retroactivity in *Chevron Oil Co. v. Huron*, 404 U.S. 97 (1971). Petitioners reason that since the New Jersey courts relied upon *Coons v. American Honda Motor Co.*, 96 N.J. 419 (1984), *cert. denied*, 469 U.S. 1123 (1985) (hereinafter referred to as "*Coons II*") which, in turn, applied the *Chevron Oil* retroactivity test, the lower court decisions are unconstitutional and inimical to the due process and equal protection provisions of the United States Constitution.

The trial court reached its decision in accordance with this Court's decisions in *Beam* and *Harper*. In *Beam*, this Court specifically stated that:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. *Beam*, 501 U.S. at 544.

In *Harper* it held that:

> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full retroactive effect in all

> cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule. *Harper*, 509 U.S. at 97.

Judge Gibson's decision and the Appellate Division's affirmance conforms to this Court's holdings of *Harper* and *Beam* despite neither court citing them. Although the rule applied by Judge Gibson was an interpretation of a state law, he applied it in the same manner this Court would apply an interpretation of a federal law: "[t]o the parties before the court and all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers", *Beam*, 501 U.S. at 535; "to any other plaintiffs similarly situated who have not yet gone to judgment or an agreement incorporated by a writing or a release." Gibson, App. 28C to Petition. Petitioners also misstate the trial court's holding as not applying to "litigants in pending cases." Petition for Writ of Cert., p.8. Judge Gibson clearly holds that his rulings apply to those "pending cases out there for which the lienability of these items is still an open question. . . ." Gibson, App. 28C to Petition.

Petitioners are trying to invoke the assistance of this Court to review this matter by claiming due process and equal protection violations by stating that claimants with open claims are in the same position as those with closed claims. Petitioners with closed claims have not been denied their due process or equal protection rights. They were represented by counsel in workers' compensation and civil courts. They had their opportunity to object to lien amounts, and did not.

The trial court and Appellate Division recognized this by indicating that to reopen the "hundreds or thousands" of

closed cases would create judicial chaos. Despite the differences between the class members, Petitioners are asking this Court to extend the holdings in *Beam* and *Harper* to all Americans thereby eliminating the discretion given to state courts to determine how to retroactively apply state laws. In *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 364 (1932), this Court held that the United States Constitution does not prevent a state from defining the limits of retroactive application of a state court's decision construing state law. Any choice as to whether to apply a decision prospectively or retroactively may be determined by the "juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Sunburst Oil*, 287 U.S. at 365. It is important for New Jersey courts, as well as other states' courts, to retain the ability to evaluate each issue of state law before them by analyzing different factors and applying those factors to the specific case. State courts are in a better position than this Court to interpret a state statute or rule of law and to decide whether it should be applied retroactively or prospectively.

As this Court has acknowledged in *Beam*, "retroactivity in civil cases must be limited by the need for a finality, (citation omitted) once a suit is barred by res judicata or a statue of limitations or repose, a new rule cannot reopen a door already closed". *Beam*, 501 U.S. at 541 (*citing Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)). The door has been closed and locked as to those Petitioners that have gone to judgment or have reached an agreement incorporated by a writing or release.

CONCLUSION

Petitioners' Petition for a Writ of Certiorari should be denied because this Court's jurisdiction is not properly invoked. The questions presented to this Court were not raised in the lower courts. The rulings of *Beam* and *Harper* were properly applied by the New Jersey courts in this matter. The state court has discretion in the prospective or retroactive application of its decisions. Accordingly Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT DATED OCTOBER 22, 1996

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ATLANTIC COUNTY
DOCKET NO. ATL-C-184-94

Civil Action

DIANE KUHNEL, Individually and on behalf of all other Workers' Compensation Lien Payors, similarly situated,

Plaintiffs,

v.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee,

Defendant.

Appendix

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

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Appendix

[43] **POINT V**

IN THE ALTERNATIVE, SHOULD THE COURT BE INCLINED TO GRANT DECLARATORY JUDGMENT IN FAVOR OF PLAINTIFFS, THE SAME SHOULD APPLY ONLY TO DIANE KUHNEL AND OTHERS WHO HAVE NOT YET PAID OR SETTLED THEIR LIEN.

Should the Court be inclined to grant declaratory judgment in favor of plaintiffs, the same should apply to Diane Kuhnel and otherwise only be applied prospectively to current "open" files and to future workers' compensation claims.

The question of application of a decision retroactively or prospectively is "among the most difficult problems that engage the attention of courts." *County of Essex v. Waldman*, 244 N.J. Super. 647 (App.Div. 1990). Where there is uncertainty over an issue in respect to interpretation of a statute a decision should be applied only prospectively. *See Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 235 (1994). Three factors are considered:

> (1) the purpose of the new rule and whether it would be furthered by retroactive application; (2) the reliance placed on the old rule by those charged with administering it; and (3) the effect that retroactive application would have on the administration of justice.

State v. Burstein, 85 N.J. 394, 406 (1981); *Frazier v. New Jersey Manufacturers Ins. Co.*, *supra*, 145 N.J. at 19.

Should this Court be inclined to grant plaintiff's motion for declaratory judgment, the purpose of the rule would be to govern the conduct of insurers and workers' compensation [44] petitioners in respect to what might be claimed as a lien. Retroactive application would jeopardize prior settlements and judgments. The tradition of finality of decision and settlement would be greatly disturbed and insurers who followed the practice employed by CNA in this case would be greatly prejudiced.

As set forth at Argument II, *supra*, and as indicated by the affidavits discussed therewith, CNA established its computer payment systems to allow it to properly classify and report payments as required by CRIB. CRIB's manual and workers' compensation insurance rates in the State of New Jersey were projected based on those reports. Assessments for the special funds administered by the Department of Labor were also based on total compensation paid as reported by CNA, which included the respondent's portion of assessments in favor of petitioners for attorneys and experts. Thus, the Compensation Rating and Inspection Bureau relied on the concept that the respondent's portion of petitioner's attorney's and expert fees were benefits to the petitioner, and therefore were loss and indemnity payments included in subrogation.

Should this Court change that concept, it should be applied only to open and future matters. CNA reasonably relied on CRIB and the Department of Labor, the agency

responsible for administering the Workers' Compensation Act. The effect of any new rule would substantially change the manner in which payments of compensation are reported to the Compensation Rating and Inspection Bureau. The Bureau would have to revise its Manual [45] and the rating structure. The retroactive effect of such a ruling on CNA would be financially detrimental. It reported and paid special fund assessments based on its understanding of the requirements of the Act and the Manual. It has no way to recoup what would amount to overpayments.

Such a ruling would also have an adverse effect on the state special funds in that the reports of the employers and insurers of amounts of total compensation paid would be reduced by approximately 12% (where there is an award of 20% attorney's fee, assessed 60% against the respondent). This would apply not only to matters involving a lien but to every case where there is an award of an attorney's fee.

Therefore, should this Court grant declaratory judgment to plaintiffs, application of the same should be limited to Diane Kuhnel and others who have not yet repaid or settled their lien, and to future petitioners.

* * *

[50] CONCLUSION

For the foregoing reasons, CNA respectfully requests that Plaintiffs' Motion for Partial Summary Judgment, Declaratory Judgment and Dismissal of CNA's Counterclaim be denied and that its Cross-Motion for Summary Judgment be granted.

Appendix

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Dated: October 22, 1996